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December 17, 2002

"VIA REGULAR MAIL"

A. J. Yates, Administrator
Agriculture Marketing Services
United States Department of Agriculture
1400 Independence Avenue Southwest
Room 3071, STOP 0201
Washington, D.C. 20250-0201

RE: Hop Marketing Order

Dear Mr. Yates:

My clients are members of a much larger group that opposes the proposed Hop Marketing Order. The Proponent Committee has submitted a request to your office for an administrative hearing for the purpose of promulgating rules for a federal hop marketing order. The purpose of this letter is to alert you to the significant opposition to this proposal from within the United States hop industry.

The Proponents Committee would like the United States Department of Agriculture to believe that its proposal enjoys strong industry-wide support. This is simply not the case. The opposition to this proposal spans Idaho, Washington, Oregon, California and all types of growers.

Contrary to the proponents' claims, they do not have a "solid majority in excess of the two-thirds needed for approval." There are significant numbers of growers against the proposed order. The State of Idaho hop growers recently voiced "in the strongest terms possible" their opposition to the establishment of a hop marketing order. Many growers in Oregon and Washington are likewise strongly opposed. The Oregon Hop Growers Association recently mailed out ballots to all growers in that state to gauge support for a federal marketing order. The results of this ballot show significant opposition. In Washington, the proponents of

the federal marketing order attempted last year to persuade the Washington Department of Agriculture to pass state regulations for a proposed hop set-aside program. While that proposed legislation enjoyed greater support among the hop industry than the current federal marketing order, it ultimately failed. (Please find enclosed the opposition's objections to the state proposal, along with the Washington State Department of Agriculture's final decision). It is important to recognize that a number of the hop growers that supported the proposed Washington State regulations are now *opposing* the current proposed federal marketing order.

The opposition group is numerous and diversified in its reasons for opposing the federal marketing order. While their reasons may be diverse, the group is strongly united in the principle that the federal marketing order is unacceptable. It is the intention of the opposition group to do everything legally within its power to stop the proposed federal marketing order. It is not this group's intention to try and change or modify the way the proposed order is written. The group is united in its belief that the federal government should not use its power to regulate the free market and the free enterprise of hop farming.

The opponents recognize that under certain conditions marketing orders have proven useful for agricultural producers. Unfortunately, the hop industry has been through three previous marketing orders that have all failed to achieve their goals. The failure of the last federal hop marketing order is still negatively impacting the growers today and is one of the historical bases for the current downturn in the global hop industry. Since the last order was terminated, the U. S. hop industry has undergone dramatic changes that make it all the more likely that the current proposed federal marketing order will likewise fail.

In addition to growers who speak out publicly against the proposed order, there are many others who will not openly commit to opposing the order because of political backlash from the proponents; however, the silent opposition will vote against the proposed order.

Due to the seriousness of this issue, the opponents' group has retained my services and has engaged an independent agricultural economist. If the proposal is allowed to go to hearing, the opponents will submit significant documentation in support of their opposition.

Further, we will be submitting a number of well-founded legal arguments against the proposed order. Upon our initial review, it appears that the proponents' proposed marketing order violates fundamental constitutional principles as well as long-held principles in agricultural law.

We urge the U.S.D.A. to deny the proponents' request for an administrative hearing. The proposed order will only serve to further divide an already divided industry. It serves no purpose for the U.S.D.A. to waste precious resources on a fractured industry and a federal marketing order that is preordained to fail.

Respectfully

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Enclosures
LLJ/re

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BEFORE THE DIRECTOR OF THE
WASHINGTON STATE DEPARTMENT OF AGRICULTURE

RE: RECOMMENDED DECISION FOR PROPOSAL TO AMEND HOP MARKETING ORDER TO IMPLEMENT A SPECIAL ASSESSMENT ON HOPS AND CONDUCT A SET-ASIDE PROGRAM	Case No. CV 99-02186 OBJECTIONS

COME NOW PUTERBAUGH FARMS, INC., STACY PUTERBAUGH, R MARTIN PUTERBAUGH, DOUBLE "R" HOP RANCHES, INC., KEVIN RIEL, KEITH RIEL, STEVEN RIEL, SHINN AND SON, INC., EDWARD L. SHINN, G. S. DESMARAIS, L.L.C., GEORGE ERIC DESMARAIS and G. S. DESMARAIS by and through their attorney Leander L. James, of the firm of OWENS, JAMES & VERNON, P.A., and submit their Objections to the Washington State Department of Agriculture's Recommended Decision for Proposal to Amend Hop Marketing Order to Implement a Special Assessment on Hops and Conduct a Set-Aside Program

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I.

BACKGROUND

Hop farming, like any farming, involves economic risk. Hop growers control this risk by entering into pre-season contracts to sell their hops at a contract price that is above anticipated production costs and therefore profitable. These contract hop farmers forfeit the benefit of receiving potentially high price swings that can occur on the spot market; they trade-off economic certainty by giving up potentially high spot market gain. Some hop farmers use a combination of contract selling and spot selling to manage their economic risk-reward ratio.

Hop farmers who primarily sell their hops on the spot market are spot market growers. These growers do not enter into pre-season contracts. Rather, they grow hops to sell at the spot price on the free market. These farmers assume the economic risk-reward ratios of the free market in hopes the price of hops will rise. Technology has allowed spot hop growers more flexibility. The spot grower stores his harvest in cold storage until prices rise, timing the sale of his hops when the price of hops is high.

By 2001 the Washington spot hop farmers had grown and amassed in cold storage an oversupply of hops. Hop prices dropped to historic lows--below $1 per pound. Nevertheless, contract hop growers were still

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able to negotiate contracts that brought prices above anticipated production costs for the 2002 harvest Spot hop growers, on the other hand, were facing economic difficulty.

A group of these spot growers started a movement to create a statutory scheme whereby hop growers (largely contract growers) are taxed, and these funds paid to other growers (largely spot hop growers) to set-aside acreage. The statutory scheme has duel purposes: 1) increasing and maintaining hop prices; and 2) giving spot hop growers a competitive advantage over contract growers. These spot hop petitioners circumvented the Washington Hop Commission rule making procedures and petitioned the Washington Department of Agriculture (Department) directly to pass hastily drafted legislation for the year 2002.

The Department, perhaps unwittingly, is now promoting the spot grower's agenda by recommending rule changes in the form of WAC 16-532-025 and WAC 16-532-040. These rules create a punitive tax (a 400% increase over the current assessment) on hop farmers who grow crops to pay other hop farmers to not grow crops. The purpose is to manipulate the national (and international) price of hops upward and protect the economic position of spot hop growers who have created an oversupply. The tax proceeds, and interest earned thereon, would be used

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additionally to pay for bureaucratic and enforcement expenses relating to collecting and administering this new tax.[1]

II.

OBJECTIONS

> A rule is invalid if it (1) violates constitutional provisions; (2) exceeds the agency's statutory authority; (3) was adopted without compliance to statutory rule-making procedures; or (4) is arbitrary and capricious in that it could not have been the product of a rational decision maker. RCW 34.05.570(2)(c); *Neah Bay Chamber of Commerce v. Dep't of Fisheries*, 119 Wn.2d 464, 469, 832 P.2d 1310 (1992).
>
> *Washington Ind. Tel. V. WA Util. & Trans. Comm.*, 110 Wn App. 147, 155 (2002).

A. Fatal Drafting Errors.

The proposed legislation contains a number of fatal drafting errors. The drafters were under extreme time constraints. They were given insufficient time and opportunity to carefully think through the multiple legal problems that might arise from the proposed rule changes. While presumably doing their best under these extreme time constraints, the drafters final product contains critical and fatal errors that include, are not limited to, the following:

Proposed WAC 16-532-025(1) states: "The Board shall enter contracts with and pay individual growers to refrain from growing hops

[1] Proposed WAC 16-532-025(10)(o)(3) provides that the 400% increase in assessments will be used to pay "the reasonable cost of administration incurred by the Board."

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in the minimum amount of 6,000, but not to exceed a total of 6,500, existing planted acreage."

happens if the proposed acreage does not meet the 6,000 acre minimum or exceeds the 6,500 acre maximum. The rule does not take into

some of the "committed" acreages are no longer "existing," having already been replanted with alternative crops.

The rule does not take into account that farmers who initially qualified acres for the set-aside do not have qu: ıy

Excluding these acres, the total set-aside may fall short of the 6,000 acre minimum. Inevitably, some acreage that initially qualifies for the set-aside program will be deemed non-qualifying after closer scrutiny and

paid as subsidies. In the event the total set-aside acreage falls short of the 6,000 acre minimum, what is the Hop Board to do? End the subsidy program and require repayment of subsidies paid? Who will bear the set-aside program's administrative costs? Who will compensate the taxed hop growers who will have incurred economic loss as a result of the failed program?

Indeed, misinterpretations are already occurring.

urrently calculated in the 6,000 acreage minimum are not "refrain[ing] from growing hops," as required under WAC 16-532-025(1) A number of growers who claim they fall into this category are, in fact,

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using the 2002 set-aside year to plant and grow new varieties of with higher alpha content. These farmers would characterize harvest of crops as not "growing" hops. This characterization of statute flies in the face of the plain statutory language: "refrain from growing hops." *Id.*

The proposed legislation further provides: "Contracts with growers shall be let on a first come-first served basis as determined by the date of receipt of the written commitment of the grower sent to the United States Department of Agriculture . . . in response to the solicitation issued by the Board in April 2002." WAC 16-532-025(2). While there were multiple solicitations, the statue is presumably referencing a solicitation made by Administrator Ann E. George on April 9, 2002. That solicitation states in part: "The deadline to submit set-aside acreage commitments for potential participation in this program is **April 25, 2002**." See April 9, 2002 correspondence to Washington Hop Growers (bold in original). Thus, the statute relies upon a "solicitation" and "written commitment" given *prior* to enactment of the statute. The proposed rules incorporate a deadline of April 25, 2002, occurring *before* the rules are law. potential cut-off date for qualification in the set-aside program occurs *before* the set-aside program exists.

Growers given an opportunity to commit to a "potential" set-aside before enactment of the law are in a vastly different position than

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growers after the enactment. For example, growers who did not commit acreage based upon the assumption that the set-aside program would not become law are now faced with the reality that they will not qualify (having missed the statutory deadline before the statute became law) and must bear the burden of a $10 per unit tax imposed to fund a program that was not legally in existence when they were solicited. This retroactive statutory scheme denies growers the most basic due process and equal protection under the state and federal constitutions: a grower that would otherwise qualify for the program now will not qualify because he applied late and missed a cut-off date that occurred prior to WAC 16-532-025 becoming law.

The "solicitation" referred to in WAC 16-532-025(2) belies the reality that there were multiple, confusing solicitations. This is evidenced by an April 9, 2002, memorandum posted by Washington Hop Commission Administrator Ann George, stating in pertinent part:

> Letters are going out to all Washington hop growers today soliciting acreage commitments for this Washington hop set-aside program. In order to participate in this program, the set-aside acreage commitment form included with this letter must be completed and returned to the Washington Agricultural Statistics Service. Previous acreage set-aside commitments that were submitted on the Hop Producer Agreement WILL NOT serve to enroll your acreage in this program.
>
> April 9, 2002, internet memorandum of Administrator Ann George.

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Greater confusion over this "solicitation" is created by the statement: "In order to participate in this program, the set-aside acreage commitment form included with this letter must be completed and returned to the *Washington Agricultural Statistics Service.*" *Id.*, italics added. WAC 16-532-025(2) refers to written commitments sent to the "United states Department of Agriculture." The National Agricultural Statistics Service (NASS) is an agency within, but separate from the United States Department of Agriculture (USDA). Growers who submitted commitments to the Washington Agricultural Statistics Service may not qualify for the program, since they did not submit their commitment directly to the USDA as required under the proposed rule.

The proposed rule provides: "Payment shall be made under the contract on a per acreage basis." There is no criteria to determine what a qualifying acre is. As described above, some growers interpret acreage planted with hops that are grown, but not harvested in 2002 as qualifying acreage

To whom is the subsidy paid? Who is the "grower?" Under many circumstances one party farms land leased from a second party. The subsidy is intended to compensate the "grower" for the cost of taxes, water and other operational costs while the acreage sits idle or is converted to another crop. Yet, tenant hop farmers are already abandoning acreages planted with hops to their landlords and claiming

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subsidy payments because they will "refrain from growing hops" in 2002 Under the statutory intent, the Landlord is in better position to qualify as the grower, since the landlord will bear the economic burden of removing these acreages from production. However, ironically, the landlords, who were not solicited in April 2002, will miss the "first come-first serve" cut-off date and will not qualify for the subsidy. Their basic due process and equal protection right violated, they had no notice of the cut-off and no economic incentive to apply.

The formula for subsidy payments is vague, undeterminable. The formula provides: "Payment shall be made under the contract on a per acre basis. The contract shall provide for payment to the grower of a per acre sum equal to the total amount of the funds collected under WAC 16-532-040(1)(b), together with interest earned on the funds collected, if any, less the reasonable cost of administration incurred by the Board, divided by the total acreage committed under subsection (2) of this section." WAC 16-532-025(3). This language does not tell us *when* the total funds will be collected. It does not address what are *reasonable* administrative expenses. It relies upon the denominator of the "total acreage committed under subsection (2) of this section." Yet, the acreage "committed" under that subsection in response to the April "solicitation" will not reflect the total number of acres set aside.

Proposed WAC 16-532-040 is vague and ambiguous:

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> In addition to the annual assessment specified in (1)(a), a special assessment on all varieties of hops of ten dollars per affected unit shall be imposed on hops produced in the 2002 crop year. The purpose of the special assessment is to fund the set-aside program authorized in WAC 16-532-020(10)(o).
>
> *Id.*

"Hops" are defined as: "all kinds and varieties of 'humulus lupulus' grown, picked and dried in the state of Washington, whether loose, packaged or baled and all oils, extracts and/or lupulin derived therefrom. WAC 16-532-010(9) The critical term "affected unit" is defined as: "two hundred pounds net of hops, *or the amount of lupulin, extract or oil produced from two hundred pounds net of hops.*" WAC 16-532-010(15), italics added. Thus an affected united can be a two hundred pound net of hops *or* extracted oil produced from those hops. Hop growers who currently have cold storage hops harvested in 2001 will produce these hops into pellets and extract oil or lupulin from these hops in 2002. As written, the statute literally imposes an assessment on these crops harvested last year.

When is a hop "produced," and thus subject to the $10 assessment or tax? Production is not defined. WAC 16-532-010 does define when a hop is "processed": "'Processed' means and includes all hops which are converted into pellets, extracts, oils, lupulin, and/or other forms, including hops which are frozen in undried form, but excluding whole,

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dried hop cones, whether loose or baled." WAC 16-532-010(10). Thus "whole dried hop cones, whether loose or baled" are not produced until they are converted into pellets, extracts, oils, lupulin an/or other forms. Baled hops in cold storage from 2001 will be produced into pellets, extract, oils and lupulin or other forms this year, (particularly if the spot market price for hops increases as result of the proposed set-aside legislation). uced this year, rendering them subject to the $10/affected unit tax. It is apparei the notice and comment period that hop growers have not contemplated the taxing of cold-storage hops harvested in 2001 and produced in 2002.

What is the "2002 crop year?" Is the crop year the year in which year the 2002 crop year." A grower may harvest a crop this year, place it in cold storage and not *p ice* it until next year, thus avoiding the $10/lb. tax.

The proposed rules do not prevent hop farmers who "refrain from growing hops" in one field from planting and growing hops in another field. For example, Farmer A can remove fifty acres from growing hops and receive the subsidy on those fifty acres, yet, in the same year, strategy may result in tax benefits to growers.

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B. <u>The proposed rules are beyond the scope of powers granted to the Department of Agriculture and the Washington Hop Commission.</u>

State agencies possesses only those powers granted by statute. *Washington Ind. Tel. V. WA Util. & Trans. Comm.*, 110 Wn. App. 147 (2002), citing *In re Registration of Electric Lightwave, Inc.*, 123 Wn.2d 530, 536, 869 P.2d 1045 (1994). "When reviewing an agency rule, the reviewing court shall declare the rule invalid if it finds that the rule exceeds the agency's statutory authority." *Washington Ind. Tel.*, 110 Wn. App. at 154.

Neither the Washington Department of Agriculture nor the Washington Hop Commission is empowered to impose a punitive tax on hop growers to pay other growers not to grow. See RCW 15.65.030 and WAC 16-557-030. Indeed, the proposed rules run contrary to the declaration of police power set forth in RCW 15.65.030, which provides in pertinent part:

> It is declared to be the policy and purpose of this chapter to promote the general welfare of the state by enabling producers of agricultural commodities to help themselves, in establishing orderly, fair, sound, efficient and unhampered marketing, grading and standardizing of the commodities they produce . . .
>
> *Id.*

The rules penalize farmers who had the foresight and skill to contract their hops for the year 2002 (contracted farmers in the "sold

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ahead position"). These farmers negotiated their contract price without knowledge that a $10 per unit tax would be imposed upon them. This tax will be paid to hop farmers who did not have the opportunity, desire, foresight or skill to negotiate contracts, and who nevertheless have grown crops and are flooding the market with non-contracted hops (spot hops). These later farmers took a gamble on spot hops, subjecting themselves to the free market price fluctuations. Having lost this gamble, they would now be the recipients of subsidies from the tax imposed on farmers who have done a good job of farming business management.

The rules give subsidized farmers an unfair economic advantage over the taxed hop farmers. Indeed, some of those vying for the subsidy are claiming they are not growing hops, when, in fact, they are planting and growing new hop varieties in the set-aside fields. These farmers will not harvest the new varieties this year, but will return next year with established fields of higher alpha crops that compete better with the traditional varieties grown by the taxed farmers who did not change over their fields. Similarly, hop farmers who leased land are abandoning the leased fields and claiming the subsidy (which is intended in part to compensate them for water, taxes and removal of hops in those fields) Thus the proposed rules have the direct effect of subsidizing non-contracted growers to change their fields over to more competitive, more desirable crops.

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The proposed rules will hamper the taxed farmer's ability to grow and market his crops. His/her contracts for 2002 will be worth less and, in many instances, may be economically non-viable This will engender conflicts over these contracts and litigation. The aggregate effect of the tax, lost income revenue on the amount taxed, contract disputes and lost competitive advantage in the global market will "hamper" the taxed farmer's ability to "market" his/her crops.

The higher alpha producers who were subsidized to convert their crops will cause greater glut on the market in 2003, thus aggravating the glut that these rules are intended to remedy.

The proposed rules are against the "general welfare of the state." RCW §15.65.030. Acreage removed from hop production by Washington State growers will be replaced by growers from other states (i.e. Idaho and Oregon) and nations (e.g. Germany). Foreign growers will replace Washington growers, without a net reduction of acreage. Money earned on these foreign crops, which would otherwise accrue to Washington State, will be lost to competitive states and countries. Germany, for example, which competes heavily in hop production, will gain significant economic advantage over the State of Washington.

This analysis is not altered by the newly enacted laws that purportedly affirm the Hop Commodity Board's authority to enter into contracts, at its discretion, with individual producers of the hops to set-

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aside existing planted hop acreage. See Chapter 313, Laws of 2002, Section 138. The enabling statute does not empower the Department or the Washington Hop Commission to take money and competitive advantage away from farmers growing a crop and give that money and competitive advantage to farmers who claim they are not growing the

C. <u>The proposed rules violate state and federal antitrust laws.</u>

1. State Law Violations.

The proposed rules violate state ant-trust laws. For example, RCW §15.65.600 provides:

> The director [of the Department of Agriculture of the State of Washington] shall protect the public interest and the interest of all consumers and producers of every agricultural commodity regulated by every marketing agreement and order issued pursuant to this chapter and *shall neither take not authorize any action which shall have for its purpose the establishment or maintenance of prices.*
>
> *Id.*, italics added.

The clear intended purpose of the proposed agency action is to establish and maintain a higher price for hops, in violation of RCW §15.65.600. The price of hops per pound has fallen to historic lows, below $1.00 per pound. By implementing a set-aside program the Director is attempting to reduce the international supply of hops,

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increase international demand and thereby increase and maintain higher prices for hops sold by Washington growers.

2. Federal law violations.

The proposed legislation violates the Sherman Act, 15 U.S.C. 1-7. Under 15 U.S.C. 4 it will be the duty of the United State's attorney to bring a federal action to enjoin these violations. In order to escape liability under the Sherman Act, the Department will have the burden to prove that its proposed rules fall within the protection afforded by the "state action immunity", a burden it will not carry:

> The [United States] Supreme Court has announced a two-prong test for determining when the state action doctrine immunizes a defendant's conduct from the antitrust laws: "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (citations and internal quotation marks omitted). The Court has held that state action immunity is disfavored, much as are repeals by implication". *Federal Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992) (citing *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-99 (1978)).
>
> The Ninth Circuit has articulated the application of the first prong of the test to the conduct of private parties that are regulated by state agencies: *Columbia Steel Casting Co.* v. *Portland General Electric Co.*, ___ F.3d ___, (9th Cir. 1996).
>
> *California CNG, Inc. v. Sou. CA Gas Co., 96 F.3d 1193, 1196* (9th Cir. 1996).

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a). There is no "clearly articulated affirmatively expressed state policy.

Hop farmers who *grow* hops are private parties who will be regulated by the proposed rules. The $10 per unit tax imposed upon them will be used to subsidize farmers who do not grow hops. This statutory scheme is not supported by a clearly articulated and affirmatively expressed state policy. Thus, the "actions in providing subsidized" farming will not enjoy "state action" immunity from antitrust liability. See *California CNG, Inc.*, 96 F.3d at 1200.

b). Active supervision.

To qualify for state action immunity, the Washington Department of Agriculture must not only show a clearly articulated state policy but also the active supervision of that policy by the state. *Id.* at 1202. The burden for implementing WAC 16-532-040 and WAC 16-532-025 will fall on the Washington Hop Commission Administrator (Administrator), who is severely understaffed and ill-equipped for the task. This supervision will require the Administrator to engage in on-sight inspections of hop fields allegedly set-aside to assure compliance. The administrator will need to monitor on-going compliance, collect and account for the $10/unit tax and engage in other far-ranging and time consuming administration. The Administrator would be statutorily required to

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enforce the rules and to prosecute farmers who criminally abuse the set-aside program.

Private individuals, including financial institutions likely to profit from the subsidies,[2] have already had close involvement in shepherding this legislation to this point. These private individuals are likely to be substantially involved in efforts to assure payment of the subsidies and maintenance of high hop prices, in violation of federal antitrust law

D. The Department is attempting to regulate interstate commerce in violation of federal law.

The State of Washington is attempting to regulate interstate commerce by affecting the supply and price of hops nationally (and indeed internationally), in violation of federal law.

E. The Department is acting within an area reserved to the federal government.

The proposed rules fall within the a regulatory area reserved to the federal government, U. S. Department of Agriculture. Perhaps the best evidence of this is the U. S. Department of Agriculture Marketing Order Regulating the Handling of Spearment Oils Produced in the Far West, 7

[2] Banks that have loaned money to spot hop farmers who are now at risk of defaulting on loans are positioned to receive the subsidized money through repayment of loans.

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CFR 985, (Spearment Marketing Order) promulgated pursuant to 48 Stat. 31, as amended (7 U.S.C. 601 - 674). Indeed, hop growers have already begun the process of drafting proposed regulation for the U.S. Department of Agriculture that is similar to the Spearment Marketing Order. The drafter of that order has been approached by hop growers and has agreed to draft a similar proposed marketing order for enforcement by the U.S.D.A.[3] The State is beyond its authority, encroaching into a regulatory area reserved to the federal government.

F. <u>The proposed rules violate the State and federal constitutions.</u>

The proposed rules violate the Washington State Constitution and the Federal Constitution in a variety of ways, including, but not limited to equal protection under the law and due process.

As described above, the rules apply to similarly situated hop growers in drastically differing ways. Some growers will be taxed while

[3] This parallel federal regulatory process has been acknowledge by the Washington Hop Commission administrator:

> It is important for growers to understand that the regulatory process to establish this proposed Washington Hop Commission hop set-aside program is parallel but independent of activities currently being coordinated by Hop Growers of America, which includes the development of a proposed Federal Marketing Order and securing commitments of acreage reduction and support via the submission of Hop Producer Agreements.
>
> April 9, 2002, Internet memorandum of Administrator Ann George.

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others will not. Specifically, money will be taken from contracted growers and given to spot growers. Persons unable or unwilling to commit acreage to a set-aside program before it became law are treated unequally from those who did commit acreage. Growers who committed to set aside crops prior to the April solicitation letters, but did not renew their commitment after the April letters (perhaps due to the confusion created by multiple solicitation letters) would similarly be treated unequally.

The Washington State Constitution prohibits gifts of public Funds. A gift occurs when the public funds benefit private interests where the public interest is not served. Giving the assessment/tax proceeds (public funds) to spot hop growers who do not grow crops only serves the private interests of paying money to the spot hop farmers who made a bad business decision to grow hops without a contract.

G. <u>The proposed rules are arbitrary and capricious; and they will not achieve the stated goals.</u>

The rules arbitrarily tax farmers growing crops at the rate of $10 per affected unit (a 400% increase of the current assessment of $2.50). This arbitrary amount is then reduced by administrative costs that include enforcement costs yet unknown The residual is divided by the total acreage committed prior to the enactment of the statute. See

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proposed WAC 16-532-025. The total acreage committed is an arbitrary minimum amount of 6,000 acres that does not take into consideration that these acres will likely be replaced by hops grown in other states and nations.

H. The Department has not followed the Washington Administrative Procedure Act.

The Department has not followed the Washington State Administrative Procedure Act RCW 34.05.001 et seq., specifically including violation of RCW 34.05.235. For example, the solicitation letter referred to in WAC 16-532-025 was clearly mailed prior to proper notice and comment regarding the meaning of this solicitation as a linchpin to the statutory scheme to be enacted. No rule-making procedures were implemented regarding this solicitation letter prior to its distribution.

H. The proposed rules are ex post facto laws.

The rules will be enacted after the April solicitation and April deadline were given for applying to the set-aside program. Similarly, the laws are ex post facto in that they tax market growers who have already entered into hop contracts for the sale of hops in the year 2002. Such ex post facto laws are illegal.

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III.

INCORPORATION BY REFERENCE

The Claimants incorporate by reference the objections set forth by Attorney Reed C. Powell on behalf of his clients.

IV.

RESERVATION OF RIGHTS

The Claimants reserve their rights to raise additional objections and further examples of objections set forth above.

V.

FUTURE LITIGATION

The recommended rules, as currently written, will not survive judicial scrutiny. The considerable economic toll the proposed tax will take on hop growers gives them significant economic incentive to challenge these rules in the courts. When the courts strike down the set-aside laws, the subsidies will have already been paid. The Department and the Washington Hop Commission will then be involved in a costly bureaucratic tangle. Subsidies will have to be paid back, damages will be awarded to farmers who were taxed and suffered economic harm. The Department will be liable.

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Spin-off litigation will follow. Contract disputes will surely arise. Farmers who contracted before enactment of the $10 per affected unit tax will need to pass this cost on to buyers, or incur considerable economic harm. Buyers will resist. Contract disputes and litigation will likely ensue. The Department and the Commission, having caused these conflicts, may be liable for the damage.

VI.

CONCLUSIONS

The proposed rules should not be enacted.

DATED this 22nd day of May, 2002.

OWENS, JAMES & VERNON, P.A.

LEANDER L. JAMES, WSB#24043
Attorney for Claimants

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of May, 2002, I caused to be served a true and correct copy of the foregoing instrument by FACSIMILE, E-MAIL AND FEDERAL EXPRESS addressed to the following:

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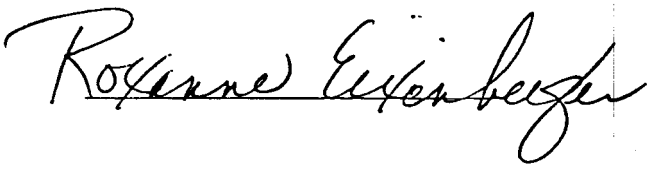
"VIA FAX: 1-360-902-2092 - AND FEDERAL EXPRESS"
wsdarulescomments@agr.wa.gov
Deborah Anderson
Commodity Commission Coordinator
Washington State Department of Agriculture
P O Box 42560
Olympia, WA 98504-2560



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BEFORE THE DIRECTOR OF THE
WASHINGTON STATE DEPARTMENT OF AGRICULTURE

Proposal to Amend Hop Marketing Order to Implement a Special Assessment on Hops and Conduct a Set-Aside Program)	**FINAL DECISION**

PROCEDURAL BACKGROUND

This matter came before the Director of the Washington State Department of Agriculture (WSDA) pursuant to two petitions filed by affected hop producers to establish a special assessment for the 2002 production season in the amount of $.05 per pound of hops (or $10 per affected unit) for the purpose of compensating growers who contract with the Commission for a set-aside of existing planted hop acreage, and to grant the Washington Hop Commission authority to implement a set-aside program during the 2002 production season pursuant to the authority set forth in Chapter 15.65 RCW.

On March 6, 2002, WSDA filed with the Washington State Code Reviser a Notice of Proposed Rulemaking (CR-102) requesting comment on the proposal to amend the Hop Marketing Order, WAC 16-532 to implement an additional assessment on hops and grant the Hop Commission authority to conduct a set-aside program by providing that the Commission may enter into contracts, at its discretion, and pay hop producers to set aside or remove from production existing planted hop acreage during the 2002 production season. The notice was published in the Washington State Register on March 20, 2002 (WSR #02-06-130).

The language of the proposed amendment is set forth in Attachment A.

Also, on March 20, 2002, WSDA issued a Notice of Public Hearing on Proposal to Amend the Hop Marketing Order to affected hop growers and other interested parties. The Notice was also published in the Yakima Herald Republic on March 21 and 23, 2002.

Pursuant to RCW 15.65.080, a public hearing was held on April 9, 2002, beginning at 10:00 a.m. at the Yakima Masonic Center, 2nd Floor, 504 North Naches Avenue, Yakima, WA. Written comments on the proposal were accepted through the close of business on April 9, 2002.

WASHINGTON HOP COMMISSION--POLICY AND PURPOSE BACKGROUND

1 The Washington Hop Commission was formed under a Marketing Order approved by a vote of the affected producers pursuant to the Washington State Agricultural Enabling Act of 1961 (Chapter 15.65 RCW) and became effective on August 1, 1964.

2. The Washington State Agricultural Enabling Act of 1961, Chapter 15.65 RCW, sets forth the following purpose and policies:

RCW 15.65.030 Declaration of purpose and police power.
The marketing of agricultural products within this state is affected with a public interest. It is declared to be the policy and purpose of this chapter:

To promote the general welfare of the state by enabling producers of agricultural commodities to help themselves, in establishing orderly, fair, sound, efficient and unhampered marketing, grading and standardizing of the commodities they produce,

and in promoting and increasing the sale and proper use of such commodities.

RCW 15.65.040 Declaration of policy. It is hereby declared to be the policy of this chapter:

(1) To aid agricultural producers in preventing economic waste in the marketing of their agricultural commodities and in developing more efficient methods of marketing agricultural products.

(2) To enable agricultural producers of this state, with the aid of the state:

(a) To develop, and engage in research for developing better and more efficient production, marketing and utilization of agricultural products;

(b) To establish orderly marketing of agricultural commodities;

To provide for uniform grading and proper preparation of agricultural commodities for market;

To provide methods and means (including, but not limited to, public relations and promotion) for the maintenance of present markets and for the development of new or larger markets, both domestic and foreign, for agricultural commodities produced within this state and for the prevention, modification or elimination of trade barriers which obstruct the free flow of such agricultural commodities to market;

(e) To eliminate or reduce economic waste in the marketing and/or use of agricultural commodities;

(f) To restore and maintain adequate purchasing power for the agricultural producers of this state; and

(g) To accomplish all the declared policies of this chapter

(3) To protect the interest of consumers by assuring a sufficient pure and wholesome supply of agricultural commodities of good quality at all seasons and times.

3 Chapter 313, Laws of 2002, Section 138 affirms the hop commodity board's authority to enter into contracts, at its discretion, with individual producers of hops to set aside or remove from production existing planted hop acreage.

4. The Marketing Order establishing the Washington Hop Commission, Chapter 16-532 WAC, currently provides for the following programs to be carried out by the Commission:

WAC 16-557-030 Marketing order purposes. The order is to promote the general welfare of the state, to enable producers of hops to help themselves establish orderly, fair, sound, efficient, unhampered marketing; facilitate cultural and harvesting improvements and regulate unfair trade practices within the industry. To carry out the purposes of the order, the board may provide for a program in one or more of the following areas:

- Advertising, sales, and promotions for maintaining present hop markets and/or creating new or larger markets for hops to increase sales;
- Providing research regarding the production, processing, and/or marketing of hops;
- Providing by rules uniform labels and labeling requirements of hops and provide for inspection and enforcement to obtain compliance;
- Investigating and acting to prevent or correct unfair trade practices or false advertising;
- Providing marketing information and services to hop producers; and
- Participating in federal or state hearings concerning regulation of the manufacture, distribution, sale or use of pesticides.

5. Pursuant to RCW 15.65, including RCW 15.65.050, WSDA asked for testimony on the following matters at the public hearings:

(a) Does the proposed amendment to Chapter WAC 16-532, the hop marketing order, further the policies in the statute, RCW 15.65 which include providing methods and means for maintaining present markets and restoring and maintaining adequate purchasing power for hop growers in this state? Is the amendment needed to fulfill these policies for the state's hop industry? Explain why the amendment is or is not needed.

(b) Does the proposed amendment accomplish the purposes and objects of the marketing order which include promoting the general welfare of the state, enabling producers of hops to help themselves establish orderly, fair, sound, efficient, unhampered marketing and standardization of hops, and regulating unfair trade practices within the hop industry?

(c) Can the purposes and objectives of the amendment be accomplished independently without amending the marketing order?

TESTIMONY ON PROPOSAL

In addition to the oral testimony given at the hearing held in Yakima, WSDA received written testimony. Many of those who provided oral testimony also submitted written testimony. A total of 27 individuals either provided oral and/or written testimony. An additional 23 individuals signed in at the hearings but did not provide either oral or written testimony.

1 Supporters of the proposal to establish a special assessment for the 2002 production season, and to grant the Washington Hop Commission authority to implement a set-aside program cited the following reasons in support of the proposal:

(a) There must be a reduction in acres in order to get supply and demand back in balance. Growers must reduce acreage or many may not be able to continue growing hops. Because of the large investment in specialized harvest equipment it will be very difficult to change farming practices and grow other crops.

- Washington State is a world leader in providing hops to breweries around the world. For others to strive for a balanced market, Washington must first lead by example by responsibly managing production.
- The buildup of inventory has created an oversupply situation with lower prices, which must be corrected in the near future.
- There is an oversupply of hops even after two warehouse fires and a devastating hailstorm. The oversupply problem would have been much worse without the fires or storm.

(b) To insure the long-term future of the hop industry, the growers need to establish a system of mandatory controlled production accompanied by any measures necessary to implement any agreed to action:

Letting the free market correct oversupply could result in a substantial number of growers forced out of the industry and the entire industry weakened as a result. Future problems will be much greater, if the industry does not act now. Economic means (free market) are not a viable option. Such an approach sends a message that growers are irresponsible. It will destroy the infrastructure of the industry and reduce the willingness of financial institutions to lend. It will cause brewers to hold off for even lower prices and growers elsewhere to wait for our collapse.
Most growers support an alternative to the free market approach.
The proposed amendment is the first phase in an effort to deal with the problem; the second phase will be a federal marketing order.

(c) The proposed amendment is needed and will provide a means for maintaining present markets and purchasing power for hop growers in Washington.

The proposal is necessary to reduce excess acreage.
The proposal gives growers an exit strategy.

The problem cannot be corrected without the proposed amendment.
The proposal supports the marketing order.
The proposal would promote the general welfare and does benefit Washington State.
The proposal would provide stability in the market place.
The proposal offers an orderly way of eliminating huge inventories of hops.
The amendment will afford growers the time and money needed to adjust their farming operations to the global market.
The proposed amendment will provide funding to participating farmers that will cover fixed costs associated with their idled ground during this transition period.

(d) By addressing the problem together as an industry instead of following the "each man for himself" approach, the hop industry will succeed in bringing balance to the market and ensure that all share the load thereby making solving the problem of oversupply less of a burden on any one grower.

Historically voluntary plans failed because smaller growers took advantage of several larger growers who set aside acreage. The program must be mandatory and every grower must participate in order for the program to be successful.
A representative group of growers put the proposed program together to deal with the problem of overproduction. All hop growers were contacted so that they could participate in addressing the oversupply issue.
The cost of this program and its benefits will be spread equally across the Washington hop industry over time.
The proposal should be put to a vote.
Clearly, even the growers participating in the set aside are going to lose money. However, all had a part in this overproduction and all should share in the reduction.

(e) Large brewers are unwilling to sign forward contracts for a product that has been consistently overproduced for more than a decade. Several of them have stated that until growers bring supply in line with demand the hop industry can expect no significant changes in their buying practices.

2 Four lending institutions testified in support of the proposal:

Unless growers take steps to restore profitability and remain viable, lenders will withdraw from the market.
The challenge to the hop industry has not resulted from changing lending standards but from changes to grower's balance sheets and profit and loss statements caused by oversupply and the build up of inventories.
Oversupply has resulted in crops being sold below cost of production.
The limited number of buyers coupled with an imbalance between supply and demand has resulted in the interest cost of inventory being shifted to the grower. This has put financial stress on both banks and growers.

- Growers need to collectively solve the problem.
- The proposal in a good step in the right direction.

3. **Opponents** to the proposal to establish a special assessment for the 2002 production season and to grant the Washington Hop Commission authority to implement a set-aside program cited the following reasons in opposition to the proposal:

(a) Using the Hop Commission for collecting fees for crop reduction is far from the intentions for which it was formed.

The proposal is in conflict with RCW 15.65.040(2)(f), which prohibits sales below the cost of production or sales to liquidate inventory as well as other sections of the statute. The proposed changes conflict with RCW 15.65.040(2)(f) and (3); RCW 15.65.340(3), (4) and (6)(a); and RCW 15.65.370.

The proposals are counterproductive and will not allow for unhampered marketing as the state will become involved in a process that discriminates between growers based on marketing philosophy.

The objectives of the proposed amendment do not carry out the mandate dictated by the enabling act. The set aside program does not advertise or promote the Washington hop industry. It does not maintain or create present markets (it in fact destroys markets) and it does not provide for any research.

This program is not intended to increase the sale of hops; it is intended to decrease the sale of hops from Washington State.

This amendment does nothing to preserve present markets for Washington hop growers. If anything, this proposed amendment most likely would cause a decrease in Washington States' global market share for hops.

The proposal is venturing into unknown territory. No other commission does this.

The set aside program does not advertise or promote the program and is contrary to stated goals of WSDA concerning the hop marketing order. The amendment does nothing to preserve present markets for Washington State hops.

The Commission does not have enough control of U.S. hops to fix the oversupply and the proposal will penalize Washington growers.

The assessment is contrary to the policies in the statute by adding an unfair monetary burden to only a segment of the industry.

There is good evidence that 6,500 or more acres will be idle in 2002 without intervention. Growers with unsold hops will be setting aside acreage.

(b) An additional assessment on Washington hop growers would interfere with previous hop contracts.

Buying and selling of hops is usually done on multi-year contracts and a significant amount of growers already have contracts. These growers will not have an opportunity recapture the assessment in the form of higher hop prices because they have already marketed the majority of their hops. The increase will decrease net margins by anywhere from 33 percent to 50 percent.

This amendment would affect Washington growers in vastly differing ways according to their sold ahead position. Growers who have done a good job of marketing their future hop crop will be greatly penalized and asked to turn money over to growers that have failed to cover their future hop crops. Growers with unsold hops will be setting acreage aside while growers with contracts will be growing acreage.

The amendment would bring into question every submitted operating budget on which financial institutions had based their lending decisions.

(c) If Washington loses long-term market share to other countries or states, the purchasing power of the industry will be decreased.

- The amendment would diminish the market for Washington hops by making them more expensive in the marketplace.
- Since the current imbalance in supply and demand is a global issue, Washington State cannot correct the problem itself and should not be expected to shoulder the burden alone.
- If the Washington hop producers are perceived by large brewers as being responsible for a significant decline in hop acreage, it is reasonable to expect that these large brewers might shift their purchases to other states or countries.
- There is no way that concerted action by Washington growers can force a reduction in the production from other areas. The one sure way the market will come back into balance is if the normal laws of supply and demand are permitted to operate.
- Washington hop producers command 77 percent of the market share. Oregon and Idaho account for another 23 percent. By agreeing to a 6,000-acre reduction, Washington is agreeing to a 23 percent reduction in acreage. This amendment guarantees Washington will lose market share.

(d) The timing of this amendment makes it impossible for growers to know if the subsidy will be available for the year.

- Hop growers must know by the end of May whether to string their acreage or not and the final out come of the amendment will not be known until July.
- A one-year assessment would, at most, be a temporary measure. It does nothing to guarantee that the set aside acreage will not come back into production in 2003.

A tally of the attendance at the hearings and the positions of those providing oral or written testimony on the proposals to amend the hop marketing order under WAC 16-532 is as follows:

(a) Of the 27 individuals who provided written and/or oral testimony:

17 supported the proposals
10 opposed the proposals

(b) Of the 23 individuals who signed in at the hearings and who did not provide testimony:
14 supported the proposals
2 opposed the proposals
6 did not indicate a position
1 spoke for another not in attendance

(c) Of the total 50 individuals:
31 supported the proposals
12 opposed the proposals
7 did not indicate a position.

RECOMMENDED DECISION

On May 6, 2002, the Acting Director issued a Recommended Decision that proposed to send the proposal in this matter to referendum pursuant the authority set forth in Chapter 15.65 RCW. On May 8, 2002, the Recommended Decision was mailed to all hop affected producers and interested parties. Under the provisions of RCW 15.65.110, notice was given that Exceptions or Objections to the Recommended Decision must be filed with the Acting Director by 5:00 p.m. May 23, 2002.

EXCEPTIONS AND OBJECTIONS FILED WITH THE DIRECTOR

The following Exceptions and Objections to the Recommended Decision on the Proposal to Amend Hop Marketing Order to Implement a Special Assessment on Hops and Conduct a Set-Aside Program were filed with the Director:

1. It was contended that the proposal contained a number of fatal drafting errors:
   - A question was raised on what happens if the proposed acreage did not meet the 6,000-acre minimum or exceeds the 6,500 maximum.
   - It was claimed that because of incorporation of a deadline of April 25, 2002 that occurred before the rules are law, growers who did not commit acreage based upon the assumption that the set-aside program would not become law are now faced with the reality they will not qualify and must bear the $10 per unit tax imposed to fund the program.
   - It was stated that there is no criteria to determine what a "qualifying acre" is or when it would be determined.
   - Questions were raised about when total funds would be collected and what reasonable administrative costs would be.
   - The proposed language for WAC 16-532-040 was alleged to be vague and ambiguous. When is a hop "produced" and subject to an assessment? It is not clear whether the rule imposes an assessment on hops harvested in 2001 that are held in cold storage and produced into pellets and from which oil or lupulin is extracted in 2002.
   - It was stated that the proposed rules would not prevent hop farmers who refrain from growing hops in one field from planting and growing hops in another field.

It was stated that the proposal did not address issues between tenant hop farmers and landowners where tenants have already abandoned planted hop acreage.

2. The proposed rules were alleged to be beyond the scope of powers granted to the Department of Agriculture and the Washington Hop Commission:
   - A comment was received that the WSDA or the Hop Commission is not empowered to impose a punitive tax on hop growers to pay other growers not to grow hops. The proposal was alleged to run contrary to the declaration of police powers set forth in RCW 15.65.030.
   - It was claimed that the proposal penalizes farmers who had the foresight to contract their hops for the year 2002 and who negotiated contracts without the knowledge that a $10 per unit tax would be imposed upon them.
   - Some believed that the rules give subsidized or "spot market" hop farmers an unfair economic advantage over the taxed or "contracted" hop farmers.
   - It was stated that some growers have contracts that were made two or three years ago.
   - It was claimed that there is no statutory authority that authorizes the imposition of an assessment for the purpose of paying growers. The amendment is alleged to add an unfair burden to only a segment of the industry who had pre-existing contracts.
   - It was also asserted that the assessment would add a financial penalty to those growers who were successful in marketing their crops and reward those growers who chose not to sell their hops.

3. It was contended that the proposed rules violate state and federal antitrust laws.
   - One claim was that by implementing a set aside program, the Director would be attempting to reduce the international supply of hops, increase international demand and thereby increase and maintain higher prices for hops sold by Washington growers.
   - Another claim was that the concentration of so much hop production in so few individuals raises at least the issue of anti-trust considerations and the potential for price manipulation and restraint of trade.

4. It was contended that the proposed rules violate the Sherman Act, 15 U.S.C. 1-7.
   - It was stated that hop farmers who grow hops are private parties who will pay a $10 per unit tax imposed upon them to be used to subsidize farmers who did not grow hops. The statutory scheme is alleged to not be supported by a clearly articulated and affirmatively expressed state policy.
   - It was stated that WSDA must also show the active supervision of the expressed state policy. Implementation will be by the Hop Commission which is viewed as being understaffed and ill equipped for the task. Supervision is viewed as requiring on-sight inspections of hop fields allegedly set aside to assure compliance.

5. It was alleged that the state is attempting to regulate interstate commerce by affecting the supply and price of hops nationally and internationally in violation of federal law.

6. It was contended that the proposed rules fall within the regulatory area reserved to the federal government.

7. It was alleged that the proposed rules violate the state and federal constitutions including equal protection under the law and due process.

8. The comments contended that the rules arbitrarily tax farmers growing crops. The amount of assessments collected would be reduced by administrative costs that are alleged to be unknown. The total acreage committed was alleged to be an arbitrary minimum amount of 6,000 acres that does not take into consideration acres likely to be replaced by hops grown in other states.

9. It was contended that WSDA has not followed the APA (RCW 34.05.325). The solicitation letter referred to in WAC 16-532-025 was mailed prior to what was viewed as proper notice and comment and prior to rulemaking procedures being implemented.

10. It was contended that the proposed rules would be enacted after the April solicitation and sign-up deadline. Growers who have already entered into hop contracts for the sale of hops would be taxed.

11. It was contended that the recommended rules would not survive judicial scrutiny. Contract disputes and litigation will likely ensue between private parties. WSDA and the Commission were also viewed as potentially liable.

12. It was contended that the proposal does not maintain present markets

13. It was noted that of the 17 individuals who provided written or oral testimony in support of the proposal, 4 were not hop growers. It was claimed that there is also legitimate reason to believe that some growers who provided testimony in support may now vote against the proposal due to the fact that over 6,000 acres of hops have already been removed from production without the proposed assessment.

14. There were contentions that restricting acreage does not maintain markets:
- It was claimed that the program was not about wealth creation, but wealth re-distribution to speculative hop growers.
- It was stated that the National Agricultural Statistics Services has calculated that the 2002 US hop crop is 67 percent sold. This means growers have contractually bound themselves at a pre-determined price level.
- It was stated that this program is supposed to be designed to let hop yards be idle but instead it was claimed that the yards are being transplanted into better varieties so that next year the yards will be in full production with more alphas.
- It was stated that growers on the open market would now profit because acres committed to set-aside might allow them to sell their hops in inventory. Growers not selling on the open market will allegedly be penalized.
- It was stated that market forces and the law of supply and demand would dictate prices whether or not there is an "orderly" reduction of acreage. The laws of supply and demand were viewed as not needing help from the State of Washington to ensure that hop growers bring supply and demand back into balance.

by making them more expensive in the marketplace.

It was stated that the economics of hop farming have already dictated removal of producing acres in the first three months of 2002.

It was alleged that the 400 percent increase in assessment would only serve to further burden hop producers.

It was stated that some tenants might gain a windfall by returning their leases back to the landowners and not paying anything while collecting $300 per acre. The landowners were alleged to be the ones who are taking care of the land, paying the taxes, and spraying for powdery mildew.

It was stated that by allowing the set-aside program to proceed, this gives growers hope that this will create a market, so they are going to grow their hops without contracts once again this year. It was alleged that next year will be worse because super alpha hops are being planted and the fact that some growers are still growing on the spot market in hopes of selling at high prices.

It was stated that there is no evidence or reasonable inference therefrom, that the set aside program will in any manner reduce the crop year 2002 hop production.

It was claimed that no thought has been given to the fact that many grower entities are controlled by the same individual(s). One entity can reduce hop acreage production and another entity (controlled by the same individual) can increase hop acreage production. The net effect is that there would not be a reduction in hop production.

It was claimed that there is no correlation between price being paid per acre to presumably reduce hop production and the hops being produced on the acreage.

It was alleged that the proposed set aside program appears to impose an assessment by the larger hop producing entities on the smaller entities.

FINDINGS

Based on the facts, testimony and evidence received at the public hearing, the written comments received by WSDA, the matters of which the Director may take official notice under RCW 15.65.100 and the Exception and Objections received following the issuance of the Recommended Decision, the Acting Director makes the following:

1 The Acting Director finds that WSDA issued notices, held hearings and received public comment in accordance with the requirements of RCW 15.65 and RCW 34.05.

2. The Acting Director reviewed the original record compiled prior to the issuance of the Recommended Decision and considered all material filed during the Exceptions and Objections filing period.

3. The Acting Director finds that the hop industry appears to be deeply divided over the purpose, merits, intentions, fairness, administration and other aspects of the proposal.

4. The Acting Director finds that while the public hearing and initial comment period served to raise a number of issues and potential problems with the proposal to amend the

Hop Marketing Order to implement a special assessment on hops and to conduct a set-aside program, those issues and potential problems were more fully developed and presented during the Exceptions and Objections period following the issuance of the Recommended Decision. Strong arguments were made that the marketing order purposes and policies would not be furthered by the proposal and the proposed amendment would not the purposes and objects for which it was proposed.

5. The Acting Director finds the proposal is not fully developed. For example:
   (a) The proposal fails to include key definitions that appear to be essential to the administration of the amendment, as became evident during the exceptions and objections period.
   (b) The proposal does not completely address how hops that were harvested in 2001 and placed in storage, then processed into oils, extract, or lupulin in 2002 would be treated.
   (c) The proposal does not address landowner/tenant issues related to acreage that has been abandoned by the tenant.
   (d) The proposal does not take into account that many hop growers have already contractually bound themselves at a pre-determined price level for the 2002 crop year.
   (e) The proposal does not address growers who purported to set aside acreage and then replanted acreage with super alpha hops or who planted new acreage.

6. The Acting Director finds that the Hop Marketing Order and the enabling act (RCW 15.65) purposes and policies would not be furthered by the proposal and the proposed amendment is not reasonably adapted to accomplish the purposes and objects for which it was proposed.

CONCLUSIONS

Based on the foregoing Findings, the Acting Director makes the following Conclusions:

1. The Acting Director of the WSDA has jurisdiction over this matter pursuant to RCW 15.65.

2. The Acting Director concludes that the proposal will not serve its intended purpose to provide the hop industry a means to set-aside or remove existing hop acreage from production.

3. The Acting Director concludes that because this proposal will not serve its intended purpose or the policies set forth in RCW 15.65 and WAC 16-532, this matter will not be sent to a referendum of the affected hop producers. RCW 15.65.120 directs that no further action be taken by the Director if the proposal is denied in its entirety.

NOW, THEREFORE, based on the entire record in this matter, the Acting Director enters the following:

FINAL DECISION

The proposal to amend the Hop Marketing Order to implement a special assessment on hops and to conduct a set-aside program is denied in its entirety.

DATED this 30th day of May, 2002.

William E. Brookreson, Acting Director
Washington State Department of Agriculture

ATTACHMENT A

AMENDATORY SECTION (Amending WSR 92-09-068, filed 4/14/92, effective 5/15/92)

WAC 16-532-020 Hop board. (1) Administration. The provisions of this order and the applicable provisions of the act shall be administered and enforced by the board as the designee of the director.

(2) Board membership.

(a) The board shall consist of ten members. Nine members shall be affected producers elected as provided in this section. The director shall appoint one member of the board who is neither an affected producer nor a handler to represent the department and the public.

(b) For the purpose of nomination and election of producer members of the board, the affected area shall be the entire state of Washington.

(3) Board membership qualifications.

The affected producer members of the board shall be practical producers of hops and shall be citizens and residents of the state of Washington, over the age of twenty-five years, each of whom is and has been actually engaged in producing hops within the state of Washington for a period of five years and has during that time derived a substantial portion of his income therefrom.

(4) Term of office.

(a) The term of office for members of the board shall be three years and one-third of the membership as nearly as possible shall be elected each year.

(b) Membership positions on the board shall be designated numerically; affected producers shall have positions one through nine and the member appointed by the director position ten.

(c) The term of office for the initial board members shall be as follows:

Positions one, two, three and ten - until June 30, 1967
Positions four, five and six - until June 30, 1966
Positions seven, eight and nine - until June 30, 1965

(d) Terms of office for the board members serving at the time of the 1992 amendment of this section shall be as follows:

Positions one, two, three and ten - until December 31, 1994
Positions four, five and six - until December 31, 1993
Positions seven, eight and nine - until December 31, 1992

(5) Nomination and election of board members. Each year the director shall call for a nomination meeting. Such meeting shall be held at least thirty days in advance of the date set by the director for the election of board members. Notice of every such meeting shall be published in a newspaper of general circulation within the major production area not less than ten days in advance of the date of such meeting and in addition, written notice of every such meeting shall be given to all affected producers according to the list maintained by the director pursuant to RCW 15.65.200 of the act. Nonreceipt of notice by any interested person shall not invalidate the proceedings at such nomination meeting. Any qualified affected producer may be nominated orally for membership on the board at such nomination meetings. Nominations may also be made within five days after any such meetings by written petition filed with the director signed by not less than five affected producers. At the inception of this order nominations may be made at the issuance hearing.

(6) Election of board members.

(a) Members of the board shall be elected by secret mail ballot within the month of November under the supervision of the director. Affected producer members of the board shall be elected by a majority of the votes cast by the affected producers. Each affected producer shall be entitled to one vote.

(b) If a nominee does not receive a majority of the votes on the first ballot a run-off election shall be held by mail in a similar manner between the two candidates for such position receiving the largest number of votes.

(c) Notice of every election for board membership shall be published in a newspaper of general circulation within the major production area not less than ten days in advance of the date of such election. Not less than ten days prior to every election for board membership, the director shall mail a ballot of the candidates to each affected producer entitled to vote whose name appears upon the list of such affected producers maintained by the director in accordance with RCW 15.65.200. Any other affected producer entitled to vote may obtain a ballot by application to the director upon establishing his qualifications. Nonreceipt of a ballot by any affected producer shall not invalidate the election of any board member.

(7) Vacancies prior to election. In the event of a vacancy on the board, the remaining members shall select a qualified person to fill the unexpired term.

(8) Quorum. A majority of the members shall constitute a quorum for the transaction of all business and the carrying out of all duties of the board.

(9) Board compensation. No member of the board shall receive any salary or other compensation, but each member shall be reimbursed for actual subsistence and traveling expenses incurred through attendance at meetings or other board activities: Provided, That such expenses shall be authorized by resolution by unanimous approval of the board at a regular meeting.

(10) Powers and duties of the board. The board shall have the following powers and duties:

(a) To administer, enforce and control the provisions of this order as the designee of the director.

(b) To elect a chairman and such other officers as the board deems advisable.

(c) To employ and discharge at its discretion such personnel, including attorneys engaged in the private practice of law subject to the approval and supervision of the attorney general, as the board determines are necessary and proper to carry out the purpose of the order and effectuate the declared policies of the act.

(d) To pay only from moneys collected as assessments or advances thereon the costs arising in connection with the formulation, issuance, administration and enforcement of the order. Such expenses and costs may be paid by check, draft or voucher in such form and in such manner and upon the signature of the person as the board may prescribe.

(e) To reimburse any applicant who has deposited money with the director in order to defray the costs of formulating the order.

(f) To establish a "hop board marketing revolving fund" and such fund to be deposited in a bank or banks or financial institution or institutions, approved for the deposit of state funds, in which all money received by the board except as the amount of petty cash for each day's needs, not to exceed one hundred dollars, shall be deposited each day or as often during the day as advisable.

(g) To keep or cause to be kept in accordance with accepted standards of good accounting practice, accurate records of all assessments, paid outs, moneys and other financial transactions made and done pursuant to this order. Such records, books and accounts shall be audited at least annually subject to procedures and methods lawfully prescribed by the state auditor. Such books and accounts shall be closed as of the last day of each fiscal year of the state of Washington. A copy of such audit shall be delivered within thirty days after the completion thereof to the governor, the director, the state auditor and the board.

(h) To require a bond of all board members and employees of the board in a position of trust in the amount the board shall deem necessary. The premium for such bond or bonds shall be paid by the board from assessments collected. Such bond shall not be necessary if any such board member or employee is covered by any blanket bond covering officials or employees of the state of Washington.

(i) To prepare a budget or budgets covering anticipated income and expenses to be incurred in carrying out the provisions of the order during each fiscal year.

(j) To establish by resolution, a headquarters which shall continue as such unless and until so changed by the board. All records, books and minutes of board meetings shall be kept at such headquarters.

(k) To adopt rules and regulations of a technical or administrative nature, subject to the provisions of chapter 34.05 RCW (Administrative Procedure Act).

(l) To carry out the provisions of RCW 15.65.510 covering the obtaining of information necessary to effectuate the provisions of the order and the act, along with the necessary authority and procedure for obtaining such information.

(m) To bring actions or proceedings upon joining the director as a party for specific performance, restraint, injunction or mandatory injunction against any person who violates or refuses to perform the obligations or duties imposed upon him by the act or order.

(n) To confer with and cooperate with the legally constituted authorities of other states and of the United States for the purpose of obtaining uniformity in the administration of federal and state marketing regulations, licenses, agreements or orders.

(o) To implement a set-aside program for the 2002 crop year, which shall include, but not be limited to, the authority to enter into contracts with and pay individual producers of hops to set-aside or remove from production existing planted hop acreage.

(p) To carry out any other grant of authority or duty provided designees and not specifically set forth in this section.

(11) Procedures for board.

(a) The board shall hold regular meetings, at least quarterly, with the time and date thereof to be fixed by resolution of the board.

(b) The board shall hold an annual meeting, at which time an annual report will be presented. The proposed budget shall be presented for discussion at the meeting. Notice of the annual meeting shall be given by the board at least ten days prior to the meeting by written notice to each producer and by regular wire news services and radio-television press.

(c) The board shall establish by resolution, the time, place and manner of calling special meetings of the board with reasonable notice to the members: Provided, That the notice of any special meeting may be waived by a waiver thereof by each member of the board.

NEW SECTION

WAC 16-532-025 Set-aside Program. The set-aside program for the 2002 crop year authorized in WAC 16-532-020(10)(o) shall be funded with the special assessments collected under WAC 16-532-040(1)(b). The set-aside program shall be administered by the Board as follows:

(1) The Board shall enter into contracts with and pay individual growers to refrain from growing hops in the minimum amount of 6,000, but not to exceed a total of 6,500, existing planted acreage.

(2) Contracts with growers shall be let on a first come-first served basis as determined by the date of receipt of the written commitment of the grower sent to the United States Department of Agriculture - National Agricultural Statistical Service in response to the solicitation issued by the Board in April 2002 until commitments are received totaling 6,500 acres.

(3) Payment shall be made under the contract on a per acreage basis. The contracts shall provide for payment to the grower of a per acre sum equal to the total amount of the funds collected under WAC 16-532-040(1)(b), together with interest earned on the funds collected, if any, less the reasonable cost of administration incurred by the Board, divided by the total acreage committed under subsection (2) of this section.

AMENDATORY SECTION (Amending WSR 97-17-096, filed 8/20/97, effective 9/20/97)

WAC 16-532-040 Assessments and collections.

(1) Assessments.

(a) The annual assessment on all varieties of hops shall be two dollars and fifty cents per affected unit.

(b) In addition to the annual assessment specified in (1)(a), a special assessment on all varieties of hops of ten dollars per affected unit shall be imposed on hops produced in the 2002 crop year. The purpose of the special assessment is to fund the set-aside program authorized in WAC 16-532-020(10)(o).

((~~(b)~~)) (c) For the purpose of collecting assessments the board may:

(i) Require handlers to collect producer assessments from producers whose production they handle, and remit the same to the board; or

(ii) Require the person subject to the assessment to give adequate assurance or security for its payment; or

(iii) Require the person subject to the assessment to remit assessments for any hops which are processed prior to the first sale; or

(iv) Require the person subject to the assessment to remit an inventory report for any hops which are not processed or sold prior to December 31 of the year in which they are produced.

~~(c)~~ (d) Subsequent to the first sale or processing, no affected units shall be transported, carried, shipped, sold, marketed, or otherwise handled or disposed of until every due and payable assessment herein provided for has been paid and the receipt issued. The foregoing shall include all affected units shipped or sold, both inside and outside the state.

(2) Collections. Any moneys collected or received by the board pursuant to the provisions of the order during or with respect to any season or year may be refunded on a pro rata basis at the close of such season or year or at the close of such longer period as the board determines to be reasonably adapted to effectuate the declared policies of this act and the purposes of such marketing agreement or order, to all persons from whom such moneys were collected or received or may be carried over into and used with respect to the next succeeding season, year or period whenever the board finds that the same will tend to effectuate such policies and purposes.

(3) Penalties. Any due and payable assessment herein levied in such specified amount as may be determined by the board pursuant to the provisions of the act and the order, shall constitute a personal debt of every person so assessed or who otherwise owes the same, and the same shall be due and

payable to the board when payment is called for by it. In the event any person fails to pay the board the full amount of such assessment or such other sum on or before the date due, the board may, and is hereby authorized to add to such unpaid assessment or sum an amount not exceeding ten percent of the same to defray the cost of enforcing the collecting of the same. In the event of failure of such person or persons to pay any such due and payable assessment or other such sum, the board may bring a civil action against such person or persons in a state court of competent jurisdiction for the collection thereof, together with the above specified ten percent thereon, and such action shall be tried and judgment rendered as in any other cause of action for debt due and payable.